IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-672

T.I.M.E.-D.C., INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae*. The EEAC supports the position of the Respondent T.I.M.E.-D.C., Inc. in urging the Court to reverse the decision of the Fifth Circuit Court of Appeals.[1] The written consent of the parties hereto to the filing of this brief has been filed with the Court Clerk.

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[1] The EEAC also has filed a brief *amicus curiae* in another case before the Court in *East Texas Motor Freight System, Inc.* v. *Jesse Rodriguez*, No. 75-718. The EEAC's position concerning the proper role of statistics in a Title VII class

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia. EEAC was founded to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituants, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

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action is discussed more fully in its *Rodriguez* brief. Parties to the *T.I.M.E.-D.C.* case have been served with EEAC's brief in *Rodriguez*.

PRELIMINARY STATEMENT

In the instant case, the Court of Appeals ruled that a pattern and practice of discrimination was established which justified an award of a full seniority carryover to line driver positions for *all* minority city drivers of the employer in the alleged class. In so doing, the Court of Appeals substantially expanded upon the remedy ordered by the district court which carefully tailored the relief based upon the degree to which the evidence establishd that individual minority employees were injured by the discrimination.

In reaching this conclusion, the Court of Appeals placed substantial reliance upon its reasoning in *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974) which is also now before this Court for review as Case No. 75-718. Although this case and *Rodriguez* have followed somewhat different courses through the courts and present somewhat different issues, it is submitted that they both represent the tendency for an "undue emphasis" on statistics "to obscure rather than advance the judicial process." *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974).

The issue of the proper role of statistics in a Title VII class action is now before this Court for the first time in these cases. No issue is more crucial to the rational and effective enforcement of the equal employment opportunity enactments. The standards which this Court adopts will not only affect the result in these cases, but will have a far reaching effect in cases arising in different factual contexts, and under different equal employment opportunity laws and programs.

As was stated in its brief in *Rodriguez*, the EEAC recognizes that statistics may be relevant to Title VII enforcement if used rationally and intelligently. This Court has heretofore adhered to the principle that the objectives of Title VII are to determine (1) whether there are identifiable victims of discrimination entitled to relief and (2) if so, who are those victims and what remedy is appropriate to make them whole. *E.g.*, *Franks* v. *Bowman Transp. Co.*, 47 L. Ed.2d 444 (1976). The statistical parity approach of the Fifth Circuit is not consistent with these objectives and serves instead to foster preferential treatment at odds with Section 703(j) of Title VII.

The objectives of Title VII can be achieved only if (1) statistics are assigned their proper role in the allocation of the burden of proof, and (2) sufficient authority is left to the fact finder to make adjustments based upon the nature of the discrimination alleged, the victims identified, and the remedies sought and the other facts surrounding the particular claim at issue. These guidelines were not followed in this case and, accordingly, it is these issues to which the following is directed.

PROCEEDINGS BELOW

In order to place the issues in context, it is necessary to review the proceedings below. The case arose out of two suits brought by the United States. The first, filed in May, 1968, was limited to the Nashville terminal. The second, filed in 1971, alleged system-wide discrimination at all of the Company's 51 trucking terminals. As a result of a Consent Decree which resolved most of the issues in the cases, the only

issues left for the district court to decide were whether a pattern and practice of discrimination had been established, and if so, which employees were "individual or class discriminatees suffering the present effects of past discrimination." (517 F.2d at 307).

The district court concluded that because the statistics established that the Company had not hired minorities in proportion to their numbers in the population based on Standard Metropolitan Statistical Area (SMSA) census statistics, a pattern and practice had been established. (517 F.2d at 307). The district court ordered a remedy which was based on the degree of injury which the evidence established had been suffered by potential individual discriminatees. The employees were divided into three groups in the decree, as follows (517 F.2d at 308):

> 1. Appendix A included 30 individuals who the district court found "have suffered severe injury" because of the defendant's practices. These employees were given the right (unavailable to other employees) to transfer to line positions with a seniority carryback for bidding and layoff purposes to July 2, 1965—the effective date of Title VII.
>
> 2. Appendix B included four employees. The district court found that, as to these four, the evidence "is not sufficient to show clear and convincing specific instances of discrimination" but they were "very possibly the objects of discrimination and . . . likely harmed by such discrimination." These employees were given the right to transfer to road jobs with seniority carried back to January 14, 1971—the date the systemwide suit was filed.

3. The remaining 300 plus incumbents were placed in Appendix C because the district court had "no evidence to show that these individuals were either harmed or not harmed individually by the discrimination to the class as a whole." Nonetheless, these employees were still awarded a preference for road drivers positions over the general public and other incumbent city employees.

The Court of Appeals affirmed the district court's finding of an unlawful pattern and practice of discrimination, but rejected the district court's manner of awarding relief. Apparently, it was the Court of Appeals' view that it was not the province of the district court to determine the remedy based on the degree of individual injury shown because this would "defy reason and waste precious judicial resources." Despite the reasonable assumption that the remedy stage had already been completed, the Court of Appeals made the curious statement that "whatever evidentiary hearings are required for individuals can well be postponed to the remedy." (517 F.2d at 319).

The Court of Appeals then ruled that the distinction between the three groups must be abolished and the same relief must be granted to all incumbent minority employees hired prior to 1969. Thus, the court ordered that all these minority employees should be allowed to transfer to line driver jobs and to exercise their full seniority with the Company for all purposes. (517 F.2d at 299) Further, the Court of Appeals rejected the July 2, 1965 cut-off date for the seniority carryback and held that full seniority must be awarded even though it may extend back beyond the effective date of Title VII. (517 F.2d at 320).

The Court of Appeals rationalized this conclusion on the ground that the statistical showing of past discrimination warrants a grant of full seniority carry-over to all minority employees in the alleged class because, to do otherwise, would perpetuate the consequences of past discrimination.

It is submitted that the Court of Appeals' reliance upon an invalid statistical presumption, and its application of the perpetuation of past discrimination standard in this case, is flawed in numerous respects. The district court's decision, which carefully attempted [2] to award appropriate relief to identifiable victims of discrimination, conforms with the objectives of Title VII and was not shown to be clearly erroneous. The Court of Appeals' decision which, in effect, may well grant preferential treatment to non-victim beneficiaries, is unnecessary, unjustified and contrary to Title VII objectives.

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[2] The basic principles underlying the district court's insistence that relief be granted to those who can show "individualized" discrimination are sound. Its award, however, of a bidding preference to class members of Appendix C (see *supra*, p. 6) is inconsistent with these standards.

ARGUMENT

THE COURT OF APPEALS IMPROPERLY EXTENDED THE RELIEF GRANTED BY THE DISTRICT COURT TO PERSONS WHO WERE NOT SHOWN TO BE VICTIMS OF DISCRIMINATORY CONDUCT.

A. The Court Of Appeals' Decision Is Contrary To *McDonnell Douglas* v. *Green* And Other Applicable Authorities.

After a lengthy pre-trial proceeding culminating in a consent decree resolving most issues, the issue to be tried became sharply defined. The district court was asked to determine whether the defendants had engaged in a pattern and practice of discrimination and, if so, to determine which *individuals* were injured by this pattern and practice.

In making its determination the district court's manner of proceeding followed what this Court has articulated as the standard for determining an individual's right to relief under Title VII. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), this Court held that the plaintiff must show the following to establish a *prima facie* case:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (footnote omitted)

Each of the thirty employees who were awarded a seniority carry-over to 1965 upon transfer to line driver positions was either an applicant for original

hire or for transfer to a line driver job, or had been subjected to some other specific act of discrimination. (517 F.2d at 308 n. 16). Four more minority members were given somewhat more limited seniority carryover rights, because the evidence indicated that they were very possibly the objects of discrimination. As for the remaining employees, however, there was no evidence of discrimination against them or resulting harm. Nonetheless, even these employees were given a questionable (see *supra*, p. 7, n. 2) preferential right over incumbent city drivers or new hires for line driver jobs. Thus, under the *McDonnell Douglas* standard the district court was most liberal in awarding relief. Clearly, the district court recognized that it had no basis for awarding all employees the same relief as the thirty who had been specifically shown to have been injured.

The Court of Appeals unjustifiably discarded the district court's carefully tailored remedy and held that *all* minority employees in the alleged class were entitled to fictional seniority in road driving positions, without regard to whether they had ever indicated a desire to transfer. The Court of Appeals attempted to rationalize this on the basis that the work force statistics showing a statistical underrepresentation of minorities in the road driver positions in 1971 are dispositive of the claim of discrimination against all minority employees. Then the Court of Appeals attempted to buttress its conclusion by citing the testimony of those who had shown that they had sought and been denied road driver positions. But this testimony can only support the district court's manner of determining those injured, and the Court of Appeals' reliance on this testimony

is totally inconsistent with its arbitrarily placing 300 others in the same remedy status as the 30 who proved acts of discrimination.

The Court of Appeals attempted to distinguish the *McDonnell Douglas* case due to its "peculiar factual setting" and by its own explicit terms. What is meant by the "peculiar factual setting" is never explained. In *McDonnell Douglas* the court set out an express standard for proving that a specific minority member was discriminatorily denied a job. As the district court here recognized, the impact of discrimination on individual class members is precisely the issue to be addressed in fashioning Title VII remedies.

It is true, of course, that in *McDonnell Douglas* this Court was only directly concerned with the burden of proof in an individual case. But the same considerations should be applicable in identifying which individuals were injured in a class action or a pattern and practice case.[3] This is particularly true here because the express issue assigned to the district judge was to determine which individuals had been discriminated against.

The Court of Appeals here made two conclusions based upon workforce statistics. First, it found that

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[3] In both *Rodriguez* and this case, the Fifth Circuit attempts to distinguish *McDonnell Douglas* by pointing out that it did not involve a class action. That attempted distinction, however, does nothing more than describe how the plaintiff there chose to bring its suit. There is nothing in the language of the Court's opinion in that case that would foreclose the application of its principles to class actions.

statistics were evidence of "past discrimination." Second, it then presumed, without any further evidence, that members of the three purported classes suffered a legally cognizable injury which entitled them all to the same relief. It is this jump to the second finding which is particularly contrary to the basic objective of fairly and accurately identifying the victims of discrimination and which is most likely to result in preferential remedial awards which conflict with the objectives of Title VII. While statistics may be evidence of historical discrimination against minorities generally, it is totally inconsistent with *McDonnell Douglas* to suggest that it can be presumed from the work force statistics that additional members can be added to the group entitled to maximum relief when there is *no* evidence that they meet the *McDonnell Douglas* standard. The illogic of the Court of Appeals' reasoning is apparent: under its decision, a person can gain a finding of discrimination in a class or pattern and practice action, even though he would not be entitled to such a judgment if he brought the action as an individual.

Other courts in Title VII class actions have consistently limited relief to those persons who show they applied or otherwise manifested their interest in a position. For example, in *Franks* v. *Bowman Transportation Co.*, 47 L. Ed.2d 444 (U.S. 1976), the seniority relief was limited to a class of identifiable individual blacks who had applied for over-the-road positions and whose applications were put in evidence at trial. (47 L. Ed. at 457, 458 n. 10) The same approach was followed by the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416,

419 (6th Cir. 1974) where the Court enjoined the discriminatory practice for the benefit of blacks generally, but the class entitled to a full seniority carryover was properly limited to those city drivers who specifically requested a transfer or who filed a charge of discrimination with the EEOC. Similarly, in *ACHA* v. *Beame*, 531 F.2d 648 (2nd Cir. 1976), the Second Circuit, to insure that the relief is limited to those "who had actually been discriminated against," set out the following test (531 F.2d at 656):

> "For guidance of the district court, we suggest that the burden of satisfying the court on this issue by a preponderance of the evidence should be on the individual plaintiff. The female police officer might, for example, satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females."

By analogy, the courts have consistently held that proof of actual damages must be predicated on a showing that the class members were qualified for and denied particular vacancies. *Green* v. *Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1299 (8th Cir. 1975); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231-232 (4th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314-16 (6th Cir. 1975), petition for cert. pending in Case No. 75-220; *Norman* v. *Missouri Pacific R. R. Co.*, 497 F.2d 594 (8th Cir. 1974). Indeed, as the Fifth Circuit stated in *Baxter*

v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir. 1974):

> "[T]he initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown . . . to be possessed by the higher paid white employees and are job related."

See also, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975) where the Court affirmed dismissal of a class action when the named plaintiff was unable to establish a *prima facie* case under the *McDonnell Douglas* standard, and because "he could only speculate that approximately 200 past and present employees" were also affected by the challenged practices.

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975), this Court stated that the standard for review of a district court's determination in a Title VII case is whether it "was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." And, as recognized in *Franks* v. *Bowman*, *supra*, 47 L.Ed.2d at 465, a seniority award is not a requisite in all circumstances: "the fashioning of appropriate remedies involves the sound equitable discretion of the district court."

In this case the district court heard exhaustive evidence and based its decision on a careful analysis of the relative injury to individuals in the class. The Court of Appeals made no attempt to refute the district court's factual findings as to who are the

identifiable victims of the alleged discrimination. The relief awarded by the district court is supported by both the facts and the applicable legal principles; indeed, as noted above, p. 7, n. 2, the district court went beyond what might otherwise be authorized in awarding relief to the Appendix C employees. There was, therefore, no basis for the Court of Appeals' reversal.

B. The Failure Of The Court Of Appeals To Recognize The Fallacies In Its Statistical Presumption Resulted In An Impermissible Award Of Preferential Treatment.

Premised upon the statistical underrepresentation of minorities in the line driver positions as of 1971, the Court of Appeals concluded that a *present pattern and practice* of discrimination against *all* minority employees had been established. The Court failed to recognize, however, that many of the positions which make up the statistics upon which it relies were filled prior to the effective date of Title VII. Thus, work force statistics alone are not a reliable indicator of whether the members of the purported class have been victims of discrimination subsequent to 1965.

No one is contending that underrepresentation statistics cannot be indicative of pre-Act discriminatory practices. But if the focus is solely on unexamined work force statistics, a pattern and practice of discrimination finding will always be present and cannot be rebutted unless and until the employer achieves a racial balance equivalent to the Standard Metropolitan Statistical Area Ratios.

However, Section 703(j) of Title VII (42 U.S.C. § 2000e-2(j)) expressly states that "[n]othing contained in this title shall be interpreted to require any

employer . . . to grant preferential treatment to any individual or to any group . . . *on account of an imbalance which may exist* with respect to the total number or percentage of persons of any race . . . employed by the employer . . . in comparison with the total number or percentage of such race . . . in any . . . area . . . or in the available work force in any . . . area." [Emphasis added]. As this provision was explained in the legislative history:

> "[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be would involve a violation of Title VII because maintaining such balance would require an employer to hire or to refuse to hire on the basis of race." Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senators Clark and Case. Floor Managers, 110 Cong. Rec. 7212, 7213 (1964).

In effect, therefore, by presuming discrimination because of underrepresentation statistics, the court is presuming all employers to be guilty of discrimination until they achieve an appropriate racial balance—an interpretation which is directly contrary to Congressional intent.

The danger of this type of fallacious reliance upon work force statistics is illustrated by *Watkins* v. *Steelworkers*, 516 F.2d 41 (5th Cir. 1975). There the district court found liability in favor of the entire class of black incumbent employees because the operation of a seniority system resulted in the employer's work force being virtually all white. This, in turn, led to a remedial order requiring quotas to achieve statistical parity. The Court of Appeals re-

jected this order because, despite the absence of blacks in the work force, there was no evidence that the class the work force, there was no evidence that the class members "had suffered individual discrimination at the hands of the Company" (516 F.2d at 46). As the court stated further:

> "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. The facts reveal that none of plaintiffs sought employment with the Company before 1965, the effective date of Title VII. And additionally, the district court did not find that the Company has discriminated in hiring since 1965. The result which plaintiffs seek, therefore, is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j)."

In other words, the work force statistics showing a virtual absence of blacks were not determinative of liability because the statistics resulted from acts occurring before the effective date of Title VII. This was not recognized, however, until the Court of Appeals, unlike here, centered upon whether there were identifiable victims of discrimination, rather than solely on work force statistics.

In this case, certain victims were identified by the district court who were shown to have been specifically injured by the employer's practices. But, the addition by the Court of Appeals of 300 persons who were not shown to have suffered individual discrimination, stems from the same logical fallacy as the district court's presumption of discrimination in

Watkins. It presumes present discrimination, not because those 300 were shown to be victims of discrimination, but because of a failure to reach statistical parity caused, at least in part, by pre-Title VII conduct.

Viewed from a somewhat different perspective, what must be recognized is that, to the extent that the Court of Appeals relied upon work force statistics rather than on evidence of injury to identifiable victims of discrimination, the most that can be presumed from the statistics is a possibility of *past discrimination against minorities generally*. To attempt to determine solely from numerical ratios *who* might be the *victims* of either past or present discrimination is logically impossible. Indeed, if the issue of *present* discrimination is to be determined solely by statistics, the only logical comparison is with the present statistics on *hiring of minorities generally* for line driver positions. These statistics show that by the time of the district court decision the Company was hiring blacks for line driver positions *at a rate of 64%* (517 F.2d at 316, n. 31). If statistics are to be determinative, therefore, the most relevant statistics establish that the Company is *not* engaged in a present pattern and practice of discrimination against minorities.

The Court of Appeals, of course, also relied upon specific evidence of persons who testified to past discriminatory conduct against them. No one is suggesting that these persons do not have a right to prove that they are the present victims of past discrimination. Indeed, this is precisely the approach employed by the district court. The point is, however, that the *only* additional reason given by the

Court of Appeals for its finding that *all* minority city drivers are presently being discriminated against is a statistical showing which, in the Court's view, evidences past discrimination against minorities generally. This establishes nothing as to *who* may have been the victims of either past or present discrimination.

As Congress perceived in adding Section 703(j) to Title VII, the emphasis on reaching a specific racial balance may have the tendency to result in preferential treatment. The Court of Appeals did not heed this warning and evidenced no real awareness of the practical result of its holding. It granted fictional seniority in road driving positions to 300 city drivers who had not demonstrated that they had applied for or otherwise manifested an interest in road driver positions. These rights are in preference to hundreds of employees (a large percentage of whom are minority)[4] who specifically applied for and were hired or transferred into road drivers jobs. These drivers now may be bypassed, notwithstanding their legitimately obtained seniority rights. They may understand the legitimacy of the seniority rights granted to the 30 victims identified by the district court as having sought and been denied line driver and other positions at an earlier date. However, the seniority rights granted to 300 other city drivers who did not show injury can only be perceived by the incumbent road drivers as unfair preferential treatment.

The Court of Appeals in rejecting the significance of Section 703(j) simply begs the question. It con-

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[4] The record shows that 30 percent of line drivers whose seniority rights will be jeopardized are minority (517 F.2d at 316, n. 31).

tends that it is "well established" that the remedy it imposed is permissible. As shown above, however, to the extent the remedy flows to persons who were not shown to be victims of acts of discrimination, the remedy is contrary to well established authority. The Court of Appeals then attempts to justify the remedy based upon cases authorizing temporary quota relief in a hiring context. But an analysis of those cases only serves to further emphasize the care which must be taken to insure that an undue reliance upon statistical inferences does not result in impermissible preferential treatment.

As Judge Clark observed in his concurring opinion in *Morrow* v. *Crisler*, 491 F.2d 1053, 1060 (5th Cir. 1974), "no holding by this or any other court has yet spelled out how quota relief can be squared with constitutional fundamentals." Justice Douglas expressed his concern in *De Funis* v. *Odegard*, 416 U.S. 312, 343-44 (1974):

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .
>
> "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordianlike quality . . . So far as race is concerned, any state sponsored preference to one race over another in that competition is in my view 'invidious' and violative of the Equal Protection Clause."

Because of these constitutional difficulties, and the cited language in Section 703(j), the courts have had difficulty in rationalizing preferential relief.[5]

Generally, preferential hiring rights or temporary quotas have been limited to cases in which the statistical disparity is great, the defendant's conduct is particularly egregious or the defendant has been particularly intransigent in remedying discrimination by other means. For example, in *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), it was noted that the defendant city had had only one black fireman in 25 years. In *United States* v. *Ironworkers, Local 86*, 315 F.Supp. 1202 (D.Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), it was noted that less than one percent of the union membership was black. In *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974), a temporary quota was authorized because no significant improvement in the number of blacks in the Mississippi Highway Patrol had been shown in the last two years since the entry of the district court's initial decree. In *United States* v. *Lathers, Local 46*, 471 F.2d 408 (2d Cir. 1973), a quota was ordered only after the union was cited for contempt in failing to comply with a court-approved settlement agreement.

In the instant case, the Court of Appeals specifically noted that the company's "recent hiring progress stands as a laudable effort to eradicate the effects of past discrimination" (517 F.2d at 316). This case, therefore, does not involve an intransigent employer or union, and where preferential treatment

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[5] See Judge Hays' dissent in *Rios* v. *Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974).

may possibly be justified because of a virtually total and continuing exclusion of minorities generally.

The Second Circuit's approach to the preferential question is particularly instructive. Recognizing the possible constitutional infirmities in the grant of preferential treatment, that court has allowed temporary quotas only in the most extraordinary circumstances and only when "the effects of the reverse discrimination will be defused among an unidentifiable group of unknown potential applicants." *EEOC* v. *Local 638*, 12 FEP Cases 755, 761 (2d Cir. 1976).

Thus, for example, the Court refused to award preferential relief in determining promotional rights because the effect on those not favored "would be harsh and can only exacerbate rather than diminish racial attitudes." *Bridgeport Guardians, Inc.* v. *Members, Bridgeport Commission*, 482 F.2d 1333, 1350 (2d Cir. 1973). It is submitted, that the same considerations should mitigate against the remedy in this case which favors victimless beneficiaries over numerous other employees—both black and white—who may be bypassed by the favored employees.

Finally, the comments of Judge Feinberg in his concurring opinion in the *Local 638* case should be considered. He first expressed doubts as to the validity of quotas and then emphasized the following (12 FEP Cases at 766):

> "Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminatorily denied jobs, can accomplish much without resort to quotas. Cf. Acha v. Beame, 12 FEP Cases 257, slip op. 2041 (2d Cir.

> Feb. 19, 1976). The remedy would go to all who fell into this category and would be based, not upon a percentage or quota perhaps forbidden by section 703(j), but upon proof of individual discrimination."

In this case the district court focused on individuals who were found to have been discriminatorily denied line driver jobs. But the Court of Appeals focused on statistics rather than on identifiable victims. This resulted in a preferential remedial award contrary to the intent of Title VII. The reversal of the district court was clearly error.

CONCLUSION

It is submitted that the guiding principle for Title VII was succinctly stated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), as follows:

> "Discriminatory preference for any group is precisely and only what Congress has proscribed."

It is the concern of the EEAC that an undue reliance upon statistical inferences of discrimination as evidenced by this case and others can undermine this basic objective. Statistics should be assigned no greater weight than is consistent with fairly and accurately identifying the victims of discrimination. The Court of Appeals' fallacious application of its statistical presumption in this case cannot be justified. The district court's careful attempt to determine the actual victims complied with the intent of Title VII.

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